

Protecting the Innocent

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IT WAS BIG news when Raymond Buckey and his 63-year-old mother were acquitted of sexually abusing children in the McMartin Preschool, not just because of the distress we all feel about the abuse of children, but because most Americans assumed that the defendants were guilty and that the legal system had fouled up again. *Saturday Night Live* captured the spirit. It described a picture of Peggy McMartin Buckey wiping a tear from her eye when she heard the jury's verdict as: "Mrs. Buckey molesting her eye."

The media coverage suggested that the Buckeys got off on some technicality. That's not what happened. As the comments of the jurors made plain, the only evidence against the Buckeys was the children's statements, and their credibility had been undermined by a series of investigative and prosecutorial missteps.

The jury simply felt that there was not enough reliable evidence to decide whether the children had actually gone through the horrible things they described—or imagined them following the unintentional prompting of adult investigators and therapists. One juror explained: "If we had not seen those tapes [of the children being interviewed], I would have been able to believe their testimony a little more." Many experts agree.

This is not the same as saying that the Buckeys have had their innocence established beyond any doubt; but it is farther from saying they are guilty. Few acquittals *do* establish innocence beyond a doubt; what they establish is innocence in law. Still, we may never know what really happened at the McMartin Preschool.

But there is little question about

what happened after the investigation began. As the presiding judge said, the case "poisoned everyone who had contact with it." Everyone suffered—the children, who twice went through weeks of cross-examination (not to mention years of unresolved tension); the parents, who shared their children's hurt; the investigators, therapists, and prosecutors, who will never know whether their mistakes led to the legal debacle; and the defendants, who were convicted by the media on the day of their arrest and who spent years in jail without a trial.

THERE ARE a number of lessons to be learned from the McMartin case which would help prevent a replay of this tragedy. And, although they may make us uncomfortable, it is important to identify them.

1. *Parents and other adults must be alert to the possibility of child abuse, but the threat should not be exaggerated.* Sexual abuse of children is a serious national problem. Anyone's child could be abused by a child-care worker, a teacher, a custodian at a day-care center, a baby-sitter, an older sibling of a playmate, or even a relative. But the danger needs to be kept in perspective. According to a study for the U.S. National Center on Child Abuse and Neglect, children are much less likely to be abused in day care than by their own parents. And that danger is itself sometimes exaggerated.

Media coverage of individual cases, though, often leaves the impression that child molesters are lurking everywhere. At the height of the McMartin hysteria, national magazines had cover stories on how to tell whether a day-care center posed a threat of sexual abuse. Keeping a watchful eye for signs of possible abuse is a reasonable response to the risk; being fearful and suspicious of all centers is not.

2. *Children must be encouraged to tell about being sexually abused, but inappropriate interviewing techniques can undermine the credibility of their*

statements. Again we must keep a balanced approach. For too long, revulsion toward acts of sexual abuse prevented adults from seeing what was happening to innocent children. When children came forward seeking protection, too often they were not believed; many were punished. In cases of sexual abuse, where there are often no witnesses and only ambiguous physical indicators, the child's statements may be the only real evidence. So children should be questioned whenever there seems to be a possibility of abuse. And any description of being abused should be pursued vigorously—but with an open mind.

Some experts assert that "children never lie." This is simply false. Like some adults, some children lie, exaggerate, or fantasize. There is always the danger that a child's description of being maltreated is untrue.

As the McMartin case demonstrates, for young children, the basic issue is whether an interviewer has used leading or suggestive techniques to implant a distorted or untrue version of such abuse in the child's mind. One judge explained how the untrue accusations in a case before him were probably the result of "layers and layers of interviews, questions, examinations. . . . Because the children now believe that such abuse occurred, they are unable to separate the facts from the learned experience, and, consequently, their behavior is just the same as if they were abused."

In another case, a three-year-old child told an adult that some candy had fallen into her underpants. By the time an investigator interviewed her, the candy in the underpants had become a candle in the vagina. It took many months to establish that her initial statement had been accurate and that the candle story was the result of a sequence of adult misinterpretations which eventually became imbedded in the child's memory.

3. *Horror stories of widespread sexual abuse and satanic rituals should make us skeptical, even if they make titillating reading.* Initial reports about McMartin highlighted disgusting tales of animal murder and bizarre behavior which, for months, were reported as true, not only by the tabloids, but by our most respected news organizations. In 1984, for example, on ABC's newsmagazine *20/20*, reporter Tom Jarriel referred to

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the preschool as "a sexual house of horrors."

It's easy to see why the media emphasized the most sensational aspects of the case. As *The New Republic's* "TRB" explained, "A lot of the graphic horror stories in the press are little more than child porn, published or broadcast because editors and producers want to titillate. And when they're not being salacious, the media is being mawkish, which sells almost as well."

Even when the McMMartin investigation failed to corroborate the children's grisly but apparently imaginary allegations, few asked whether that meant the assumptions underlying the entire case should be re-examined. One child, for example, testified in the preliminary hearing that he was taken to a cemetery, where he was forced to help dig up a coffin and watch as the body was cut up with knives. Another child testified at the actual trial that he saw Ray Buckey kill a horse with a bat. Uncorroborated as they were, such outlandish stories should have given us pause.

4. *The McMMartin acquittals do not mean that we have to abandon due process of law and the presumption of innocence in order to protect children.* As a former prosecutor in the New York City Family Court, I can attest to how excruciatingly hard it can be to prove abuse. In recent years, concern about the difficulty of proving child sexual abuse has led most states to relax the rules of evidence and legal procedures in these cases. Many of these changes have been needed to modernize the law, but some have ignored the defendant's right to a fair trial and are being struck down by the courts. There is a real danger that the McMMartin acquittal will lead to even more extreme laws that compromise the rights of the innocent as well as the guilty.

McMartin serves as a primer of how *not* to investigate child abuse. Criticism has already focused on the videotaped interviews of the children by social workers who, with leading questions, pressed the children to describe what happened to them. But problems actually started much earlier—when the police, after receiving the first report of possible abuse at the preschool, sent a letter to the families of two hundred current and former students that read: "Please question your child to see if he or she has been a witness to

any crime or if he or she has been a victim." "Our investigation indicates that possible criminal acts include: oral sex, fondling of genitals, buttock, or chest area, and sodomy, possibly committed under the pretense of 'taking the child's temperature.'" The letter went on to imply that Ray Buckey was the perpetrator.

In February 1985, the U.S. Justice Department convened a meeting of prosecutors and police investigators to assess the implications of the rash of failed child-sexual-abuse prosecutions. Their conclusion? That law-enforcement agencies had not been trained for these cases and had made many mistakes, compromising their case at the outset. Since then, these agencies have become much more adept at handling these

sionately and with appropriate concern about the influence adults might have exerted." We should strengthen the jury by making it easier for people with jobs and families to serve.

6. *There must be greater accountability for abuses of prosecutorial discretion.* The day after Peggy McMMartin Buckey was acquitted, she sued almost everyone associated with the case, including ABC television. But she did not sue the district attorney, even though that office was most responsible for what happened. Prosecutors have absolute legal immunity for their decisions.

It is necessary to protect prosecutors from liability because the fear of a lawsuit might chill their decision making. Yet, Peggy Buckey spent almost two years in jail; her son nearly five years.



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cases—and there have been hundreds of successful prosecutions.

5. *The American jury remains our most steadfast protection against overzealous law enforcement.* It is hard to imagine a case in which untried defendants stood more unequivocally convicted by the media and the public. A "lynch-mob syndrome" is what the *Los Angeles Times* called it.

In recent years, our jury system has been much criticized for being old-fashioned and inefficient. But in watching juries at work in controversial cases like this one, one cannot help being impressed by their ability to avoid the passions of the day and to weigh the evidence fairly. The *Washington Post* editorialized: "Natural sympathies in the case were all on the side of the children, yet the jurors were able to weigh the children's testimony dispas-

And there have been suggestions that electoral politics played a role in the DA's decisions. Whatever happened in this particular case, there is no doubt that prosecutors are too easily tempted to overreach in cases likely to make the evening news. Depending on the jurisdiction, state attorneys general, appellate courts, and bar associations have supervisory authority over prosecutors. These institutions should be more receptive to citizen complaints of wrongful or bad-faith prosecution.

PROTECTING CHILDREN from sexual abuse requires more than good intentions. It requires skilled professional intervention, scrupulous attention to due process, and common sense. For the sake of all concerned, let's hope that that is one lesson that has been learned. □